Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PAMELA MUHAMMAD, et. al,
Petitioners,

v.

STRASSBURGER, McKENNA, MESSER, SHILOBOD and GUTNICK, a law partnership, et. al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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August 6, 1991

QUESTIONS PRESENTED

I.

DID THE SUPREME COURT OF PENNSYLVANIA DENY THE CITIZENS OF PENNSYLVANIA THEIR DUE PROCESS RIGHT TO MEANINGFUL ACCESS TO THE COURT BY DISALLOWING NEGLIGENCE OR BREACH OF CONTRACT SUITS AGAINST LAWYERS AFTER A SETTLEMENT HAS BEEN NEGOTIATED BY THE LAWYER AND ACCEPTED BY THE CLIENTS, THUS MAKING LAWYERS UNACCOUNTABLE TO THEIR CLIENTS AND GIVING THEM IMMUNITY FROM SUIT?

II.

DID THE SUPREME COURT OF PENNSYLVANIA, DENY TO THE MUHAMMADS PROCEDURAL DUE PROCESS (. . .NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW;") UNDER SECTION 1., THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, WHEN THEY REFUSED TO PERMIT THE MUHAMMADS TO PLEAD WITH MORE SPECIFICITY AFTER PRONOUNCING THAT FRAUD HAD NOT BEEN PLEADED WITH REQUIRED SPECIFICITY?

LIST OF PARTIES

The Petitioners in this action are Pamela Muhammad, the Administratrix of the Estate of Nazir Muhammad, deceased, Abdullah Muhammad and Pamela Muhammad.

The Respondents in this action are Strassburger, McKenna, Messer, Shilobod and Gutnick, a law partnership; Howard Messer and James Thomas, Jr.

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OPINION BELOW

The Judgment and Opinions of the Supreme Court of Pennsylvania, Western District, dated March 15, 1991, are reported at 587 A.2d 1346 and are reproduced at Pages A1 to A27 of the Appendix to this Petition.

The Order of the Supreme Court of Pennsylvania, Western District, denying Reargument and Clarification, dated May 8, 1991, is not reported and appears at Page A28 of the Appendix to this Petition.

The Order and Opinion of the Superior Court of Pennsylvania, Pittsburgh District, dated May 13, 1988, are reported at 543 A.2d 1138 and appear at Pages A29 to A50 of the Appendix to this Petition.

The Order and Opinion of the Court of Common Pleas of Allegheny County, Pennsylvania, dated January 13, 1987, are not reported and appear at Pages A51 to A62 of the Appendix to this Petition.

JURISDICTION

The Judgment of the Supreme Court of Pennsylvania, Western District, was entered on March 15, 1991, and appears at Pages A1 to A2 of the Appendix to this Petition.

The Order of the Supreme Court of Pennsylvania, Western District, denying Petitions for Reargument and Clarification of said Judgment was entered on May 8, 1991, and appears at Page A28 of the Appendix to this Petition.

This Court has jurisdiction under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISION

This case involves the due process clause, Amendment XIV, Section 1. The Due Process Clause provides: ". . .nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

On December 19, 1977, petitioner Pamela Muhammad's son died in Children's Hospital of Pittsburgh as a result of medical malpractice, subsequent medical malpractice, and a defective product.

In March, 1978, Muhammad retained a lawyer. This lawyer was later replaced by respondent, the law firm of Strassburger, McKenna, Messer, Shilobod and Gutnick. These lawyers promised to pursue Muhammad's rights.

Although Muhammad's lawyers negligently failed to realize it, Muhammad had three claims. The first was against a surgeon and a hospital that had committed negligent acts which later put Muhammad's son in Children's Hospital. The second was against Children's Hospital for its negligent use of an anesthetic which killed Muhammad's son. The third was against the seller-manufacturer of the defective anesthetic.

Muhammad's lawyers missed all but the second of these three claims. They sued only Children's Hospital. Later, realizing their own negligence, Muhammad's lawyers advised Muhammad to settle her case. They snowed her with "advice" that since she was poor and black a jury would never find for her. They told her that the settlement offer of $26,500 from Children's Hospital was a good settlement. In fact, it was a travesty of justice.

Initially, Muhammad followed the advice of her lawyers and agreed to the $26,500 settlement. Later, Muhammad consulted numerous other lawyers who advised her that she had been grossly misled. Ultimately, Muhammad filed suit against her former lawyers. In this suit, Muhammad asserted three claims: 1) her lawyers' negligence in failing to recognize two of her three claims; 2) her lawyers' negligence in recommending a ludicrous settlement; and 3) her lawyers' fraud in recommending the settlement for the real purpose of covering up their negligence.

The Second Amended Complaint that Muhammad filed in the Trial Court at Paragraph No. 29 at No. GD86-19191, Common Pleas Court of Allegheny County, Pennsylvania, A309, preserved the issue that is the subject of this Petition. This same Complaint, Paragraph 29, was presented to the Supreme Court of Pennsylvania by the Respondents in their Answer to Appellees' Petition for Clarification and Reargument, A287-8, and was presented yet another time to the Supreme Court of Pennsylvania by the Petitioners in their Amendments to Petitions for Clarification and Reargument, A309.

To assert the claim that her lawyers had been negligent in recommending an inadequate settlement, it was necessary for Muhammad first to assert the validity of her claims for medical malpractice, subsequent medical malpractice, and product liability. This she did. Then it was necessary for Muhammad to assert breach of a duty on the part of her lawyers in pursuing her legal rights.

This she also did. Muhammad asserted that her lawyers had breached all duty of accounting to her during the course of pursuing her legal rights and asserted that her lawyers' motive in so doing was to ". . . .foreclose [Muhammad] from redress against [her lawyers]." (Paragraph 29, Second Amended Complaint, GD86-19191, Common Pleas Court of Allegheny County, Pennsylvania, A309 and A287-8).

Later, in response to Preliminary Objections that Muhammad's former lawyers filed in the Trial Court, Muhammad again raised the issue that her lawyers had not been accountable to her during the course of pursuing her legal rights. Muhammad asserted this during the Trial Court hearing to enforce the settlement. ". . . Mrs. Muhammad was not represented by independent counsel . . . [and that] defendant Messer and his law firm now seek to profit by their own fraud on [Muhammad] . . . ." (Brief in Opposition to Preliminary Objections, A122.)

The Trial Court did not address the issue of whether, by permitting such unaccountability of Muhammad's lawyers, the Court would deprive Muhammad -- and by stare decisis all of the citizens of Pennsylvania -- of meaningful access to court. Muhammad's former lawyers had objected to Muhammad's suit against them only on the basis of collateral estoppel. Their argument was that implied in the Trial Court's approval of Muhammad's settlement was an adjudication that the settlement was adequate and that they thus could not have been negligent in obtaining an "adequate settlement." The Trial Court dismissed all of Muhammad's claims on this basis alone. It thus never reached the issue of whether the case involved a denial of meaningful access to court.

On appeal, the Superior Court of Pennsylvania reversed. The decision was based simply on the Trial Court's erroneous application of collateral estoppel.

Muhammad's former lawyers then petitioned for allowance of appeal to the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania granted allowance of appeal.

On March 15, 1991, the Supreme Court of Pennsylvania filed an Opinion which agreed with the Superior Court of Pennsylvania that, ". . . collateral estoppel does not bar this action . . . ." A9. The Court continued, however: ". . .we do not believe that our inquiry need or should cease there." A9. ". . . [W]e decide today to disallow negligence or breach of contract suits against lawyers after a settlement has been negotiated by the attorneys and accepted by the clients . . . ." A13.

The Court's decision was met with vigorous dissent from two of its Justices:

> "The majority has just declared a 'LAWYER'S HOLDIAY.' It's Christmastime for Pennsylvania lawyers. If a doctor is negligent in saving a human life, the doctor pays. If a priest is negligent in saving the

> spirit of a human, the priest pays. But if a lawyer is negligent in advising his client as to a settlement, the client pays . . . ."

Opinion of the Supreme Court of Pennsylvania, A26-7.

To preserve the issue Muhammad had raised earlier in the Trial Court, Muhammad immediately filed a Petition for Reargument. Therein, Muhammad reiterated verbatim her earlier assertion that her lawyers had breached all duty of accounting to her during the course of pursuing her legal rights and that her lawyers' motive in so doing was to ". . . foreclose [her] from redress against [her lawyers]." (Amendment to Petition for Reargument and Clarification, A309).

In addition, the opinion of the Supreme Court of Pennsylvania stated that, "In the event a litigant believes he has been fraudulently induced into settling, he has the right to file a suit, alleging with specificity the acts that he claims are fraudulent." (Emphasis in original.) A22. Muhammad had in fact alleged fraud, she believed with great speci-

ficity. Nonetheless, upon the Court's sua sponte pronouncement, along with her Petition for Reargument Muhammad filed a Petition for Clarification. Therein she represented that she could in fact plead fraud with even greater specificity and requested clarification as to whether, as a matter of right, she was not permitted to plead over.

On May 8, 1991, the Supreme Court of Pennsylvania entered an Order denying Muhammad's Petition for Reargument and Petition for Clarification. Muhammad then filed the present Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE HOLDING OF THE SUPREME COURT OF PENNSYLVANIA DISALLOWING NEGLIGENCE OR BREACH OF CONTRACT SUITS AGAINST LAWYERS AFTER A SETTLEMENT HAS BEEN NEGOTIATED BY THE LAWYERS AND ACCEPTED BY THE CLIENTS MAKES LAWYERS UNACCOUNTABLE TO THEIR CLIENTS AND THUS DENIES THE CITIZENS OF PENNSYLVANIA THEIR DUE PROCESS RIGHT TO MEANINGFUL ACCESS TO COURT.

On March 15, 1991, in one massive sua sponte stroke, the Supreme Court of Pennsylvania ". . decide[d] today to disallow negligence or breach of contract suits against lawyers after a settlement has been negotiated by the attorneys and accepted by the clients . . . ". A13. In so doing, the court made lawyers unaccountable to the citizens of Pennsylvania for any and all negligence they might commit in the course of settlement of legal claims. The result is that the citizens of Pennsylvania are denied meaningful access to court because lawyers who represent them can no longer be made to

answer for negligent representation. The holding violates the due process clause of the Fourteenth Amendment as that clause guarantees meaningful access to courts.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' (citations omitted)" Mathews v. Eldridge, 424 U.S. 319, 333, 47 L.Ed.2d 18, 32, 96 S.Ct. 893, 902 (1976). Numerous decisions of this Court have guaranteed a general right of unimpeded and meaningful access to civil courts. Boddie v. Connecticut, 401 U.S. 371, 98 L.Ed.2d 113, 91 Sup. Ct. 780 (1973) held a state law requiring payment of court fees and costs for a divorce unconstitutional where the fee requirement denied access to court to those unable to pay. Even more analogous to the present case is NAACP v. Button 371 U.S. 415, 9 L.Ed.2d 405, 83 Sup. Ct. 328 (1963). There a state law which prohibited persons from advising others that their legal rights had been infringed was held unconstitutional. In

the present case the Supreme Court of Pennsylvania has virtually enacted a "Button" law. Pennsylvanians need not be advised, even by their own lawyers whom they themselves pay, that their legal rights have been infringed. Should Pennsylvanians ever attempt to hold their lawyers accountable for failure advise them of their legal rights, the present decision of the Supreme Court of Pennsylvania will foreclose them from redress against their lawyers.

The fact that in the present case it is the judicial rather than the legislative branch that has deprived Pennsylvanians of due process makes no difference. "The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government." Brinkerhoff-Farris Trust & Sav. Co. v. Hill, 281 U.S. 673, 680, 74 L.Ed. 1107, 1113, 50 Sup. Ct. 451, 454, (1930).

In Mathews v. Eldridge, 424 U.S. 319, 321, 47 L.Ed.2d 18, 25, 96 S.Ct. 893, 896 (1976), this

Court articulated the three factors involved in analysis of due process violation:

> . . . first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. (citations omitted).

Id. at 424 U.S. 319, 336, 47 L.Ed.2d 18, 33, 96 S.Ct. 893, 903, (1976).

Under this test, first, the private interest that will be affected is monumental: the interest any Pennsylvanian might have in seeking in the court redress of a wrong. Second, on the same side of the scale, the risk of an erroneous deprivation of such interest through the procedures used also is monumental: the "procedures" used here totally and completely deprive an individual of accountability from the

lawyer representing him. Then, third, on the other side of the scale, is the government's interest. Here, that is the laudable policy of encouraging settlement of claims so that courts will not be overburdened. The problem is that nowhere in the present case, or in the Opinion of the Supreme Court of Pennsylvania, is there any factual or statistical basis for the assumption that making lawyers accountable for negligent settlements would deter lawyers from making such settlements. If a Mathews v. Eldridge balancing test is to be applied, the decision of the Supreme Court of Pennsylvania to eliminate completely the accountability of lawyers to their clients must be found to deny access to court in violation of the Fourteenth Amendment even more than would a "Button" law.

This Court therefore should issue a Writ of Certiorari to the Supreme Court of Pennsylvania and make Pennsylvania lawyers once again accountable to the citizens of Pennsylvania.

II.

YOUR HONORABLE COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI BECAUSE OF THE DISMISSAL OF MUHAMMAD'S ACTION IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT -- A DISMISSAL MADE ARBITRARILY AND CAPRICIOUSLY, CONTRARY TO ESTABLISHED STATE PROCEDURE, THE RIGHT TO PLEAD FRAUD WITH MORE SPECIFICITY AFTER DISMISSAL FOR LACK OF SPECIFICITY AT THE PRELIMINARY OBJECTION STAGE OF PLEADINGS.

A.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES THAT A STATE IN ITS JUDICIAL PROCEDURE AND PROCESS FOLLOW THE STATE ESTABLISHED RULES OF COURT PROCEDURE.

In our case the Supreme Court of Pennsylvania, despite very specific allegations of fraud found that the complaint was defective with respect to pleading fraud with specificity. A reading of paragraphs 20

through 28 of the Second Amended Complaint, A73 - A78, should be convincing of the sufficient detail of the fraud pleading. Nevertheless, the Court dismissed the complaint, but without either setting a time for correcting the complaint or stating that the complaint was dismissed with prejudice. As set forth below, a dismissal with prejudice would have been contrary to well established Pennsylvania procedure. The Muhammads did what was available to them. They asked the Court to set a time in which to file an Amended Complaint and indicated how the pleading with respect to fraud could have been made even more specific. The Muhammads filed a Petition for Reargument/Clarification. The Court, without comment, denied the Petition. There was no issue of violation of the Muhammad's due process rights until the court did not, after request to set a time for proposed amendment, honor the request.

The behavior of the Supreme Court of Pennsylvania was inconsistent with prior Pennsylvania

court procedure and as such violated the due process clause of the Fourteenth Amendment of the Constitution of the United States to the deprivation of the Muhammads. An excellent, concise presentation of inconsistency of prior state court practice being violative of due process may be found in the Harvard Law Review:

> A number of Supreme Court decisions have deemed state Court rulings imposing "procedural requirements which are not strictly or regularly followed"[1] to be inadequate. Thus, in James v. Kentucky, the Supreme Court found that the state rule requiring James to have labeled his request one for an "instruction" rather than an "admonition" had not been consistently applied in prior Kentucky cases.[2] Many other Supreme Court decisions have found state grounds to be inadequate when the application of procedural rules is inconsistent with past prac-

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[1] Barr v. City of Columbia, 378 U.S. 146, 149 (1964).

[2] James v. Kentucky, 466 U.S. 341, 345-48 (1984).

tice,[3] and in one striking case, the Court found that a stated forfeiture denied a litigant due process.[4] The risks posed by such state court rulings are plain: the State Court may be attempting to evade Supreme Court review by interposing a stated law ground, and the litigant may not have

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[3] Hathorn v. Lovorn, 457 U.S. 255, 262-65 (1982); Bouie v. City of Columbia, 378 U.S. 347, 354-55 (1964); NAACP v. Alabama ex rel Flowers, 377 U.S. 288, 295-300 (1964).

[4] See Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673 (1930). Here, a Missouri taxpayer sought state injunctive relief from a tax assessment alleged to deny equal protection. The state's highest court overruled a prior decision that administrative remedies did not exist, concluding instead that such remedies were available and hence that the taxpayer was not entitled to injunctive relief. See id. at 674-76. Finding the taxpayer guilty of laches in not having sought an administrative remedy, the court affirmed the trial court's denial of injunctive relief. See id at 675-76. The Supreme Court found that the state court's inconsistent ruling was not only inadequate to bar Supreme Court review but also violated the fourteenth amendment. See id. at 679-82.

been given a fair opportunity to comply with state rules.[5]

B.

THE STATE OF PENNSYLVANIA, LONG AGO AND WITH CERTAINTY, ESTABLISHED THE PROCEDURE THAT THE PLEADING OF FRAUD WITH MORE SPECIFICITY AFTER DISMISSAL OF A COMPLAINT AT THE PRELIMINARY OBJECTION STAGE IS PERMITTED AS A MATTER OF RIGHT.

Although, the right to amend at any stage of the proceeding is spoken of as a matter of judicial discretion, the standard of the exercise of judicial discretion has long been circumscribed to avoid caprice and arbitrariness. The amendment is to be allowed unless the proposed amendment violates the law or unfairly prejudices the rights of the other party. See the cogent and succinct statement of the

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[5] State Court Forfeitures of Federal Rights, 99 Harvard Law Review 1128, 1138.

Honorable Judge Justin Johnson of the Superior Court of Pennsylvania:

> It has long been the law to liberally grant leave to parties to amend their pleadings. Pa.R.C.P. 1028(c), 1033. Otto v. American Mutual Insurance Co., 482 Pa. 202, 393 A.2d 450 (1978); MacGregor v. Mediq Inc., 395 Pa.Super. 221, 576 A.2d 1123 (1990). Although the decision of whether to grant leave to amend a pleading is a matter of judicial discretion, such amendments should be allowed at any stage of the proceedings to secure a decision on the merits, unless they violate the law or unfairly prejudice the rights of the other party. Pittsburgh Coal and Coke v. Cuteri, ___ Pa.Super. ___, 590 A.2d 790 (1991).

A reading of the Second Amended Complaint paragraphs 20 through 28, A73 to A78, which is incorporated here by reference discloses that the original pleading of fraud was more than casually pleaded with respect to specificity. A reading of the reargument/clarification petitions and Answer, A286, A287, A309, will disclose that the Muhammads were willing to plead with even fur-

ther specificity. The time honored procedure is to permit an amendment within a period of at least twenty days on request to amend with more specificity. The first opportunity for the Muhammads to ask that they be permitted to amend was in the request for reargument/clarification petition. The petition for reargument/clarification was dismissed without comment or permission to amend.

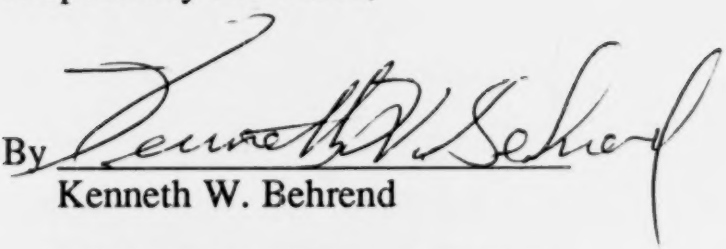
The procedure upon a request to amend requires that the party who may oppose the amendment demonstrate how they have been or will be prejudiced by an amendment. Moreover, prejudice must be more than a mere detriment to the other party because any amendment requested certainly will be designed to strengthen the legal position of the amending party and correspondingly weaken the position of the adverse party. For confirmance see Carpitella by Carpitella v. Consolidated Rail Corp, 368 Pa.Super. 153, 157, 533 A.2d 762, 764 (1987).

There is no excuse for time-honored procedure to be ignored.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

By 
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